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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 257

ED C. WRIGHT,

Petitioner,

vs.

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MILLER WALTON,
Counsel for Petitioner.

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BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Ed C. Wright, respectfully shows the Court:

I

Summary Statement

Note: The complete record is comprised of five Court of Appeals records numbered 7551, 9381, 9596, 10607 and 11209. References to them are by record number and page therein.

Petitioner seeks review of a decision[1] (11209, pp. 14-21) that the District Court possesses "discretion," in a municipal composition proceeding, to adjudge whether or not he can recover on securities that were not affected by the fully executed plan of composition, and whether or not he should be released from an injunction perpetually restraining the commencement of actions on securities affected by the plan. He urges that because the securities were unaffected by the plan, the District Court never had "jurisdiction" of them, lacking which it does not possess and cannot exercise "discretion" concerning his rights as holder. (11209, pp. 10-11, 22-26)

The plan (9381, pp. 11-18) offered to refund the principal of, and cancel past due interest on, outstanding obligations itemized in a "List of Indebtedness to be Affected by Plan of Composition" (9381, pp. 8-11), including only $237,000 of a $250,000 bond issue. (9381, pp. 8, 12) It did not offer to refund the $13,000 numbered 66/78, nor propose that the rights of their holder be adjusted or modified in any manner, and expressly limited the refunding bonds that the Board agreed to authorize, validate, and exchange for bonds, to a total of $237,000. (9381, pp. 12-13) The only reference to bonds 66/78, in the petition, plan, or list, was that the list showed their serial numbers in proper sequence, followed by the description: "Void-Turner Suit." (9381, p. 8) Substantially the same information was given in a separate list of "Creditors Who Have Not Accepted Plan of Composition" (9381, pp. 25-27), but that list also did not offer to refund the bonds, nor propose that the rights of their holder be adjusted or modified in any manner. (9381, p. 25)

The description "Void-Turner Suit" resulted from the effect that the Board erroneously attributed to the proceed-

[1] *Wright* v. *Board*, 5 Cir., 148 F. 2d 367.

ings, judgment, and appellate decision,[2] in an action by N. A. Turner, a former holder of the bonds, who mistakenly deemed them invalid, and sued unsuccessfully, before they were due, to recover for money had and received in selling them. (7551, pp. 1-154) Although Turner also sought to recover for money had and received in selling bonds 86 and 90 (7551, p. 3), the plan offered to refund them (9381, pp. 8, 12-13), but the offer was later withdrawn by amendment. (9596, pp. 66, 80)

Petitioner's then corporation, to which he is successor (10607, p. 34), submitted proofs of claim on numerous obligations (9596, pp. 58-62), including bonds 66/78. (9596, p. 58) Albert Roberts, theretofore an officer of the corporation, who had acted for it in various capacities (9596, pp. 239-241), filed a proof of claim on past due coupons from bonds owned by the corporation (9596, pp. 62-63), including coupons from bonds 66/78 (9596, p. 63), and objected that the plan discriminated unfairly in favor of principal, as against past due interest, by providing for the refunding of the former and cancellation of the latter. (9381, pp. 49-53)

The Board objected to both claims, insofar as they pertained to bonds 66/78 and appurtenant coupons, on the ground that in the *Turner* case, the verdict, judgment, and affirmance of the judgment, had conclusively determined that the Board was not indebted thereon (9381, pp. 58-60), and on the ground that the Board had "not listed in its petition as indebtedness affected by the Plan of Composition, said bonds Nos. 66 to 78 inclusive, and interest coupons and interest thereon, on account of the verdict and judgment and affirmance of the Appellate Court above referred to, and any right that the said creditor might have under such bonds and coupons will not be affected by the

[2] *Turner* v. *Board*, 5 Cir., 75 F. 2d 147.

Plan of Composition in this suit; as no provision has been made for offering refunding bonds in exchange" therefor. (9381, pp. 58, 60)

By amendment of the petition, plan, and "List of Indebtedness to be Affected by Plan of Composition" (9596, pp. 80-81, 66-77), the Board offered to refund only $235,000 of the $250,000 issue. (9596, pp. 70, 75-76) The amended petition, plan, and list, omitted all reference to, and did not mention nor describe, the $15,000 numbered 66/78, 86 and 90, did not offer to refund them, nor propose that the rights of their holders be adjusted or modified in any manner, and expressly limited the refunding bonds that the Board agreed to authorize, validate, and exchange for bonds, to a total of $235,000. (9596, pp. 70, 75-76)

Petitioner's former corporation did not participate in the subsequent proceedings. (9596, pp. 229, 235, 378; 10607, p. 36) They resulted in the Master reporting bonds 66/78 "Disallowed as void bonds" (9596, p. 263), and in the Judge finding that "the holders of such bonds and coupons cannot recover against the Petitioner, and such bonds and coupons are not refundable hereunder." (9596, p. 394)

The amended plan was confirmed by an interlocutory decree (9596, pp. 403-409) which expressly affected only the claims "set forth in said Plan of Composition as Amended and therein stated to be affected thereby." (9596, p. 404) Pending the delivery and distribution of the refunding bonds and the entry of a final decree, the interlocutory decree enjoined "all persons, firms and corporations," from commencing any action on "bonds or warrants mentioned in said Plan of Composition as being affected thereby, or on any interest coupons appertaining thereto." (9596, p. 408)

Petitioner's former corporation did not appeal. Roberts did (9596, pp. 415-416). The Court of Appeals affirmed[3]

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[3] *Roberts* v. *Board*, 5 Cir., 117 F. 2d 943, certiorari denied, 313 U. S. 582.

on the ground that the corporation owned the coupons and was the real party in interest, for which reason Roberts had no standing to appeal.

While the appeal was pending, Petitioner's former corporation moved the District Court for a declaration that bonds 66/78 were not affected by the plan, and for permission to sue in the State Court. (10607, pp. 20-25) The motion was denied before the appeal was decided. (10607, pp. 25-26)

Upon being notified of the Board's application for a final decree (10607, pp. 28-34), Petitioner moved for the inclusion in the decree of a finding that the bonds and appurtenant coupons were not affected by the plan or decree, and for the dissolution of any injunction against bringing suit on them, or in the alternative, that he be permitted to litigate their "validity" in the composition proceeding. (10607, pp. 34-38)

The final decree (10607, pp. 38-44) found that the Board had fully executed the plan by making available to the affected creditors "all the securities and money deliverable" under the amended plan (10607, p. 41); discharged the Board from all debts and liabilities "affected by said Plan of Composition, as amended" (10607, p. 43); perpetually enjoined the holders of securities "affected by the Plan of Composition" from instituting any action or suit thereon (10607, pp. 42-43), and concluded by providing that: "The questions whether bonds numbers 66 to 78, inclusive, * * * and the unpaid interest coupons originally thereto annexed, are valid or invalid, and whether they are affected by the Plan of Composition or proceedings herein, are not hereby adjudged or determined, nor are the rights of the holders thereof adjudged or determined by this decree, and the Court hereby reserves jurisdiction to adjudge and determine the validity of said bonds and coupons, as well as the rights of the holder thereof, and further reserves jurisdic-

tion to enforce such rights, if any, in such manner as the Court may deem equitable and just, and directs that the matters as to which jurisdiction is so reserved shall be litigated in this Court." (10607, p. 43, par. 10)

Following the subsequent adducing of evidence that was not considered, Petitioner's motion was denied on the ground that the matters it presented were concluded by the interlocutory decree and the order denying the former corporation permission to sue in the State Court. (10607, pp. 44-45)

The Court of Appeals reversed,[4] holding: (1) the securities were not adjudged void in the *Turner* case; (2) they are valid and have never been paid; (3) reconsideration of the disallowance of the claim on the securities was not precluded by the interlocutory decree, nor by the failure of the former corporation to appeal therefrom, nor by the order denying the corporation permission to sue in the State Court, nor by the affirmance of the interlocutory decree in Roberts' appeal—the latter because the part of the decree which disallowed the claim was not challenged; (4) the District Court had "jurisdiction in its discretion, if equity and justice so" required, to reconsider the disallowance of the proof of claim on the bonds, "or" to release Petitioner "from the injunction against a suit on them if it be true that the claim is unaffected by the composition," and also had "power to consider or reconsider" questions that the opinion expressly suggested, but did not decide, and to grant such relief as in its discretion ought to be granted.

The Court of Appeals expressly left undetermined, for future consideration by the District Court, the questions: (1) whether or not there was an estoppel by judgment because of the judgment in the *Turner* case; (2) whether or not there was an estoppel *in pais* because of admissions in

[4] *Wright* v. *Board*, 5 Cir., 142 F. 2d 577.

the *Turner* case that the bonds were invalid; (3) whether or not, after the petition, plan, and "List of Indebtedness to be Affected by Plan of Composition," were amended "so as to exclude the bonds from the debts to be composed," the Master and Judge had "authority" to decide their validity as claims in the composition proceeding.

The case went back to the District Court (11209, pp. 3-6), which adjudged: (1) there is no estoppel by judgment because of the judgment in the *Turner* case; (2) there is no estoppel *in pair* because of admissions in the *Turner* case that the bonds were invalid; (3) the Board "intended" that the plan should compose all of its bonded debt; (4) the District Court has jurisdiction, in the composition proceeding, to adjudge whether or not Petitioner can recover on the securities, and should and would make the adjudication; (5) the Board would be afforded an opportunity "to present other evidence" preliminary to any decision of the question of recovery. (11209, pp. 6-9)

Petitioner appealed from two parts of the Order: (1) the part adjudicating that the District Court has jurisdiction, in the composition proceeding, to adjudge whether or not he can recover on the securities; (2) the part adjudicating that the Board would be permitted to adduce "other evidence" preliminary to any decision of the question of recovery. (11209, pp. 9-11)

The Court of Appeals affirmed,[5] holding: (1) the Board "did not propose, in its plan of composition, to refund the bonds nor to pay nor to compose any obligation thereon;" (2) the plan had been "fully completed with no provision therein to refund the bonds of Appellant, nor to pay, nor to compose, his indebtedness;" (3) the District Court has jurisdiction to determine whether or not the securities were "affected by the plan," and has not lost that jurisdiction;

[5] *Wright* v. *Board*, 5 Cir., 148 F. 2d 367.

(4) the "effect of the plan upon the interest of a creditor," rather than the "intent of the bankrupt," is the "controlling factor" in deciding whether or not the securities were "affected by the plan;" (5) in being forced to litigate the question of "recovery" in the composition proceeding, rather than in a separate action of which the District Court would not have jurisdiction, Petitioner "is getting what he asked;" (6) there is no "good reason" why the District Court may not adjudge the question of recovery, "irrespective of any present inability to include Appellant's bonds in a plan of composition which has been fully completed;" (7) should the District Court hold that the securities were not included in the plan to be either composed, refunded, or paid, it would then seem that Petitioner's interests were not included in, nor affected by, the plan, and that the orders made in the composition proceeding relative to the securities would not preclude him from the pursuit of any judicial remedies that he might have outside of the composition proceeding, and in that event, the District Court doubtless would modify its injunction to the extent of permitting him to sue in an appropriate court for the "principal" of the bonds; (8) the District Court "still has a right to inquire" whether the failure of Petitioner's former corporation to except to the Master's Report, or to present "such" exceptions to the Judge, or to appeal from the "order" that the bonds and appurtenant coupons were not refundable and the holder could not recover on them, "reveal such a lack of vigilance as to persuade the Court that justice and equity do not now require a reconsideration of the disallowance of the proof of Appellant's claim, or the release of claimant from the injunction against a suit on the bonds;" (9) involved in the issues before the District Court is the question "whether or not Appellant is estopped to claim a right to recover on the interest coupons originally attached to the

said bonds in view of the assertions in the bankruptcy proceedings and before this Court that Roberts, a person in privity with Wright, or an agent of Wright, was the owner of these coupons;" (10) the District Court may receive evidence as to "whether or not Wright is now estopped to insist upon the right to collect interest coupons heretofore asserted to have been the property of Roberts, under a transfer deemed by the Court to have been colorable;" (11) the "burden of explaining the inconsistencies and of establishing the integrity and consequent equities of his position is upon Appellant if he now continues to assert the right to collect on the interest coupons;" (12) because the District Court made the pronouncements of "invalidity, non-recoverability, and unrefundability," it is appropriate that the District Court be resorted to first, "for any correction or clarification of such pronouncement, for if the lower Court should later hold (as it logically may, in view of the fact that the plan of composition has been fully executed) that Appellant has the right to proceed by suit in another forum, it is highly essential to its prosecution that the suit be not adjudged to be in the nature of a collateral attack upon the aforementioned adjudications of the court in bankruptcy;" (13) there has, "as yet," been no abuse of "discretion" by the District Court. (11209, pp. 14-21)

Petitioner submitted a petition for rehearing or clarification (11209, pp. 22-26), which was denied May 4, 1945. (11209, p. 27)

II

Statement of Jurisdiction

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347(a)),

conferring on this Court jurisdiction to issue writs of certiorari to review judgments or decrees of the Circuit Courts of Appeals.

The decision sought to be reviewed was rendered April 6, 1945, by the United States Circuit Court of Appeals for the Fifth Circuit.[6] (11209, pp. 14-21.) A petition for rehearing or clarification (11209, pp. 22-26), was denied May 4, 1945 (11209, p. 27.)

The decision of the Court of Appeals affirmed (11209, pp. 14-21) an adjudication by the District Court of the United States for the Southern District of Florida, that the latter has jurisdiction, in a municipal composition proceeding under Chapter IX of the Bankruptcy Act, to adjudge, and that it should and would adjudge, whether or not Petitioner can recover on securities that were not affected by the fully executed plan of composition, and whether or not he should be released from an injunction perpetually restraining the commencement of actions on securities affected by the plan. (11209, pp. 6-9.) The Court of Appeals decided that the District Court possesses "discretion" to make the adjudication, notwithstanding the fact that the plan of composition had been "fully completed with no provision therein to refund the bonds of Appellant, nor to pay, nor to compose, his indebtedness," (11209, p. 17) and "irrespective of any present inability to include Appellant's bonds in a plan of composition which has been fully completed." (11209, p. 19.)

The questions presented by this Petition are important and controlling jurisdictional questions governing not only the administration of composition proceedings by public debtors, under Chapter IX of the Bankruptcy Act, but also corporate reorganizations under Chapter X, and arrangements under Chapter XI, and have not been, but

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[6] *Wright* v. *Board*, 5 Cir., 148 F. 2d 367.

should be, settled by this Court. They involve: (1) the source, scope, extent, and limits, of the jurisdiction of a court of bankruptcy to adjudge the validity or invalidity of securities that were not affected by the fully executed plan of composition; (2) the jurisdiction of a court of bankruptcy to adjudge whether or not there can be any recovery, or the extent to which there may be a recovery, on securities concerning which the fully executed plan did not propose nor provide that the rights of the holders be adjusted or modified in any manner, and to render and coerce satisfaction of a money judgment on the securities, or to perpetually enjoin their enforcement; (3) the ability of a claimant to confer on a court of bankruptcy, by consent, a jurisdiction that was not conferred by either the Congress or the fully executed plan.

Counsel believes and urges that the jurisdiction of this Court to issue a writ of certiorari to review the decision of the Court of Appeals is sustained by *Lau Ow Bew* v. *U. S.*, 144 U. S. 47, *Aztec Min. Co.* v. *Ripley*, 151 U. S. 79, *Forsyth* v. *City of Hammond*, 166 U. S. 506, *Warner* v. *New Orleans*, 167 U. S. 467, *Title Guaranty & Surety Co.* v. *U. S.*, 222 U. S. 401, *American United Mut. L. Ins. Co.* v. *Avon Park*, 311 U. S. 143, *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, *Ecker* v. *Western P. R. Corp.*, 318 U. S. 448, *Group of Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U. S. 523, *Kelley* v. *Everglades Drainage Dist.*, 319 U. S. 415, *City of Coral Gables* v. *Wright*, 320 U. S. 729, *Young* v. *Higbee Co.*, —— *U. S.* —— (No. 342, October Term, 1944, decided February 26, 1945).

III

Questions Presented

1. Is a court of bankruptcy invested with jurisdiction to: (a) adjudge the validity or invalidity of securities

that were not affected by the fully executed plan of composition; (b) adjudge whether or not there can be any recovery, or the extent to which there may be a recovery, on securities concerning which the fully executed plan did not propose nor provide that the rights of the holders be adjusted or modified in any manner, and (c) render and coerce satisfaction of a money judgment on the securities, or perpetually enjoin their enforcement?

2. Can a claimant confer on a court of bankruptcy, by consent, a jurisdiction that was not conferred by either the Congress or the fully executed plan?

IV

Reasons Relied on for Allowance of Writ

1. The decision sought to be reviewed was rendered by the Circuit Court of Appeals for the Fifth Circuit [7] (11209, pp. 14-21), and is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *In re M. D. Mirsky & Co., Inc.*, 32 F. 2d 676 (certiorari denied 280 U. S. 579), applying former § 12 of the Bankruptcy Act, and *Seedman* v. *Friedman*, 132 F. 2d 290, applying § 369 of the present Act, the decision of the Circuit Court of Appeals for the Eighth Circuit in *Central States Life Ins. Co.* v. *Koplar Co.*, 85 F. 2d 181, applying former § 77-B(b)(10), and the decision of the Circuit Court of Appeals for the Fifth Circuit in *Green* v. *City of Stuart*, 135 F. 2d 33 (certiorari denied 320 U. S. 769, rehearing denied 320 U. S. 813), applying §§ 82 and 83(a) of the Bankruptcy Act, which govern compositions by public debtors.

2. The questions presented are important and controlling jurisdictional questions governing not only the administration of public debtor compositions under Chap-

[7] *Wright* v. *Board*, 5 Cir., 148 F. 2d 367.

ter IX of the Bankruptcy Act, but also corporate reorganizations under Chapter X, and arrangements under Chapter XI, and have not been, but should be, settled by this Court.

3. The questions presented involve the source, scope, extent, and limits, of the jurisdiction of a court of bankruptcy to adjudge the validity or invalidity of securities that were not affected by the fully executed plan of composition, to adjudge whether or not there can be any recovery, or the extent to which there may be a recovery, on such securities, and to render and coerce satisfaction of a money judgment on them, or to perpetually enjoin their enforcement, and to exercise, by consent, powers that were not conferred by either the Congress or the fully executed plan.

4. By deciding that the District Court possesses "discretion," in a municipal composition proceeding, to adjudge whether or not Petitioner can recover on securities that were not affected by the fully executed plan of composition, and whether or not he should be released from an injunction perpetually restraining the commencement of actions on securities affected by the plan, the Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings in a court of bankruptcy, as to call for the exercise by this Court of its power of supervision.

V

Prayer for Writ

A certified transcript of the entire record of the case in the Circuit Court of Appeals for the Fifth Circuit, accompanies this petition, in compliance with Rule 38 of this Court, and is made a part hereof by reference.

WHEREFORE, Petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court of Appeals to certify and send up to this Court a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in the case numbered and entitled on its docket, No. 11209, Ed. C. Wright, Appellant, v. Board of Public Instruction for the County of Broward, State of Florida, Appellee, to the end that said cause may be reviewed and the manifest errors of said Court of Appeals may be revised and corrected, as provided by law; that upon the hearing by this Court, the judgment of said Court of Appeals may be reversed, and that such further proceedings be had herein as may be provided by law and equity.

Respectfully submitted,

MILLER WALTON,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 257

ED. C. WRIGHT,

Petitioner,

vs.

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered April 6, 1945 (11209, pp. 14-21), and is reported as *Wright* v. *Board*, 5 Cir., 148 F. 2d 367. A petition for rehearing or clarification (11209, pp. 22-26) was denied May 4, 1945 (11209, p. 27).

II

Statement of Jurisdiction

A statement of the grounds on which the jurisdiction of this Court is invoked is contained in the foregoing Peti-

tion (pp. 9-11), and in the interest of brevity, is adopted as a part of this brief.

III

Statement of the Case

A statement of the case is contained in the foregoing Petition (pp. 1-9), and in the interest of brevity, is adopted as a part of this Brief.

IV

Specification of Errors

The Court of Appeals erred in the following respects:

1. In affirming the order of the District Court.

2. In deciding that the District Court possesses "discretion" to adjudge whether or not Petitioner can recover on his bonds and appurtenant coupons, or either, and whether or not he should be released from the injunction perpetually restraining the commencement of actions on securities affected by the plan of composition, notwithstanding the fact that the plan had been "fully completed with no provision therein to refund" the securities, "nor to pay, nor to compose, his indebtedness," and "irrespective of any present inability to include" the securities "in a plan of composition which has been fully completed."

V

Argument in Support of Petition

POINT I

The decision sought to be reviewed is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *In re M. D. Mirsky & Co., Inc.*, 32 F. 2d 676 (certiorari denied 280 U. S. 579), and *Seedman* v. *Friedman*, 132 F. 2d 290, the decision of the Circuit Court of Appeals for the

Eighth Circuit in *Central States Life Ins. Co.* v. *Koplar Co.*, 85 F. 2d 181, and the decision of the Circuit Court of Appeals for the Fifth Circuit in *Green* v. *City of Stuart*, 135 F. 2d 33 (certiorari denied 320 U. S. 769, rehearing denied 320 U. S. 813).

In *In re M. D. Mirsky & Co., Inc., supra*, the Court decided that in composition proceedings under former § 12, the bankrupt's offer was "to pay the creditors scheduled, and no others, * * * the bargain between the bankrupt and his creditors" being "fixed by the order of confirmation," and because the claims of two creditors had not been scheduled, they were not affected by the confirmed plan, for which reason the court of bankruptcy lacked jurisdiction to allow or disallow the claims, and the creditors could "at once resort to the bankrupt's assets," which reverted "to him upon confirmation of the composition."

Chapter IX of the Bankruptcy Act stems from former § 12.[8] A different test is prescribed to determine whether or not securities are "affected" by a plan under Chapter IX,[9] but the cited decision conflicts with the decision sought

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[8] *Ashton* v. *Cameron Co., W. Imp. Dist.*, 298 U. S. 513, *U. S.* v. *Beekins*, 304 U. S. 27, *American United Mut. L. Ins. Co.* v. *Avon Park*, 311 U. S. 143.

[9] "The term 'security affected by the plan' means a security as to which the rights of its holder are proposed to be adjusted or modified materially by the consummation of a composition agreement." § 82, 5th definition.

"The 'plan of composition,' within the meaning of this chapter, may include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through issuance of new securities of any character, or otherwise, and may contain such other provisions and agreements not inconsistent with this chapter as the parties may desire." § 83(a), 3rd paragraph.

"No creditor shall be deemed to be affected by any plan of composition unless the same shall affect his interest materially, and in case any controversy shall arise as to whether any creditor or class of creditors shall or shall not be affected, the issue shall be determined by the judge, after hearing, upon notice to the parties interested." § 83(a), 4th paragraph.

to be reviewed, because the former holds that a court of bankruptcy lacks jurisdiction to allow or disallow unaffected claims, whereas the latter holds not only that such jurisdiction exists, but also that the court of bankruptcy has jurisdiction to adjudge whether or not the holder can recover on the unaffected securities, "irrespective of any present inability to include" them "in a plan of composition which has been fully completed." (11209, p. 19).

In *Seedman* v. *Friedman, supra,* the Court decided that the term "affected by" in § 369 of the Bankruptcy Act, means "provided for by," and although a claim against the estate could result from the making, after confirmation of an arrangement, and the later rejection of a contract for the sale of the debtor's assets, the bankruptcy court nevertheless lacked jurisdiction to approve or disapprove the contract, because the possible claim was not "provided for by the arrangement." That decision conflicts with the decision sought to be reviewed, because the former holds that a court of bankruptcy lacks jurisdiction to adjudicate, and enforce or extinguish, rights flowing from an obligation unaffected by the plan, whereas the latter holds that such jurisdiction does exist (11209, pp. 18-21).

In *Central States Life Ins. Co.* v. *Koplar Co., supra,* the Court applied the provision in former § 77B(b)(10) prescribing the test to determine whether or not a creditor was "affected" by a plan of reorganization, which provision, with minor changes in language, was reenacted as the first sentence in § 107 of the present Act, and is identical, in legal effect, with the comparable provisions in §§ 82 and 83(a), governing compositions by public debtors. The decision was that because the plan of reorganization did not disturb the security held by a creditor, and the value of the security was greater than the amount of the indebtedness secured, the creditor was not affected by the plan, and could not be permitted to participate in the proceeding.

That decision conflicts with the decision sought to be reviewed, because the latter holds that the owner of the unaffected indebtedness not only is permitted to participate, but also is required to submit his rights for adjudication, and enforcement or extinguishment, by the court of bankruptcy (11209, pp. 18-21).

In *Green* v. *City of Stuart, supra,* the Court applied §§ 82 and 83(a) of the Bankruptcy Act, prescribing the test to determine whether or not a security is "affected" by a public debtor's plan of composition. The decision was that because two creditors were not required to abate "their indebtedness one whit, or in any respect" abandon or modify "any right they have to enforce it," the plan "did not purport to compose their indebtedness," and because "any applied plan affects only those within its compass," the claims of the two creditors were unaffected, and would "stand with reference to the city and to the debts composed just as they stood before the acceptance of the plan," for which reasons the two creditors were neither necessary nor proper parties to the proceeding, and could not be permitted to participate in it. The decision sought to be reviewed obviously conflicts with the cited earlier decision by the same Court of Appeals.

Point II

The questions presented are important and controlling jurisdictional questions governing not only the administration of public debtor compositions under Chapter IX of the Bankruptcy Act, but also corporate reorganizations under Chapter X, and arrangements under Chapter XI, and have not been, but should be, settled by this Court.

If a court of bankruptcy is invested with jurisdiction, in a municipal composition proceeding, to adjudge, and enforce or extinguish, the rights of holders of securities that were not affected by the fully executed plan of composition,

it is obvious that the same jurisdiction exists in corporate reorganizations and arrangements. The pertinent provisions of Chapter IX are so similar to the corresponding provisions of Chapters X and XI that the existence of the jurisdiction cannot be affirmed in one of the three characters of proceeding, and denied in either of the other two.

In view of the consequences of *stare decisis,* the effect of the decision sought to be reviewed is more far-reaching than appears superficially. The decision can be relied on as precedent establishing that in municipal compositions, corporate reorganizations, and arrangements, the jurisdiction of courts of bankruptcy is much broader and more extensive than the Bankruptcy Act appears to confer, and authorizes the adjudication, and enforcement or extinguishment, after the plan has been confirmed and fully executed, of claims and securities concerning which the plan did not propose nor provide that the rights of the holders be adjusted or modified in any manner.

Because these important jurisdictional questions have not been settled by this Court, and are of wide application, counsel believes and urges that this Court should settle them by reviewing the decision of the Court of Appeals.

Point III

A court of bankruptcy is not vested with jurisdiction to adjudge the validity or invalidity of securities that were not affected by the fully executed plan of composition, to adjudge whether or not there can be any recovery, or the extent to which there may be a recovery, on such securities, and to render and coerce satisfaction of a money judgment on them, or to perpetually enjoin their enforcement.

§ 83(e) of the Bankruptcy Act confers on the Judge jurisdiction to confirm, by interlocutory decree, the plan in a municipal composition proceeding, if he is satisfied that the plan meets the tests there prescribed; and provides that

if he is not so satisfied, he shall enter an order dismissing the proceeding. The same section also provides that "before a plan is confirmed," it may be changed or modified, if the changes or modifications are approved by the Judge and accepted in writing by the debtor. § 83(f) provides that the interlocutory decree shall become and be binding on "all creditors affected by the plan," when the securities or other consideration to be delivered under the terms of the plan shall be made available to the creditors, and that, thereupon, the court shall enter a final decree discharging the debtor from "all debts and liabilities dealt with in the plan," and determining "that the plan is binding upon all creditors affected by it." The only injunctive jurisdiction conferred by Chapter IX is limited to restraining the commencement or prosecution of actions on "securities affected by the plan." § 83(c)

The jurisdiction of a court of bankruptcy, in a municipal composition proceeding, obviously is strictly limited to disapproving, or approving and carrying out, a proposed composition.[10] The sole and single purpose of the jurisdiction is to permit public debtors and their consenting creditors to compose the indebtedness "affected" by the plan of composition.[11] There is in Chapter IX no provision conferring on a court of bankruptcy jurisdiction to adjudge, and enforce or extinguish, the rights of holders of securities that were unaffected by the fully executed plan. What then, is the source of the jurisdiction? Counsel does not know, and neither the District Court nor the Court of Appeals pointed to it.

Should the District Court, sitting as a court of bankruptcy, decide that Petitioner is entitled to recover on the bonds and appurtenant coupons, or either, what relief

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[10] *U. S.* v. *Beekins*, 304 U. S. 27, *Leco Properties* v. *Crummer*, 5 Cir., 128 F. 2d 110, *Ware* v. *Crummer*, 5 Cir., 128 F. 2d 114.

[11] *Green* v. *City of Stuart*, 5 Cir., 135 F. 2d 33.

could it grant? Could it enter a declaratory judgment merely adjudicating that Petitioner is entitled to recover, and remitting him to the State Court for that purpose? Could it go further, and enter a money judgment against the Board? If so, it necessarily would have ancillary jurisdiction to coerce satisfaction of the judgment. The only methods would be to order that money in the official custody of the Board be used for that purpose, or that taxes be levied, collected, and applied in satisfaction. In either event, would not the court of bankruptcy thereby restrict and interfere with the control of the Board "over its fiscal affairs," in a manner and to an extent not authorized nor provided for by the plan? [12]

If the District Court, sitting as a court of bankruptcy, lacks jurisdiction to enforce any rights that Petitioner may have, is it invested with jurisdiction to extinguish them, by perpetually enjoining their enforcement? Can it compel Petitioner to litigate an issue on which, if he is successful, the Court can grant him no relief, but if he is unsuccessful, his rights will be extinguished and lost? It is a strange doctrine that requires him to litigate his rights in a court that cannot enforce, but can extinguish them.

If the District Court lacks jurisdiction to adjudicate the validity or invalidity of the securities, it is both elementary and fundamental that Petitioner's former corporation was never under a duty to be on guard against, nor to challenge, nor to appeal from, a void finding of invalidity. Therefore, the former corporation was not under a duty to except to the Master's Report, nor to present "such" exceptions to the Judge, nor to appeal from the

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[12] *Ashton* v. *Cameron Co. W. Imp. Dist.*, 298 U. S. 513, *U. S.* v. *Beekins*, 304 U. S. 27, *Leco Properties* v. *Crummer*, 5 Cir., 128 F. 2d 110, *Ware* v. *Crummer*, 5 Cir., 128 F. 2d 114, *Green* v. *City of Stuart*, 5 Cir., 135 F. 2d 33.

"order" [13] that the bonds and appurtenant coupons were not refundable and the holder could not recover on them. Since there was no duty to take any one or more of those procedural steps, the failure to take any or all count not "reveal" a "lack of vigilance," and could not justify a refusal to release Petitioner from either the interlocutory or perpetual injunctions restraining actions on securities affected by the plan—if the effect of either injunction is to restrain an action on Petitioner's securities.

The Court of Appeals distinguished between Petitioner's bonds and the appurtenant coupons. (11209, pp. 18-21). It held that the District Court could modify its injunction to the extent of permitting Petitioner to sue for the "principal" of the bonds, but if he seeks to collect the coupons, he has the burden of explaining the inconsistencies and of establishing the integrity and consequent equities of his position. (11209, pp. 20-23). The distinction is unfounded and cannot be justified. If the bonds were unaffected by the plan, the coupons also were unaffected, even though formerly asserted to have been the property of Roberts, under a transfer deemed colorable, because the plan was equally silent concerning both the bonds and coupons. It embodied no proposal concerning either, and did not provide that the rights of the holders be annulled, cancelled, or otherwise extinguished, nor that they be adjusted or modified in any manner. Absent any such provision, the coupons were unaffected, irrespective of who held or claimed to hold them, and regardless of any purpose for which they were sought to be used.

Point IV

A court of bankruptcy cannot exercise, by consent, a jurisdiction that was not conferred by either the Congress or the fully executed plan.

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[13] It was a "finding," not an order (9596, pp. 388, 394).

The subject matter of a proceeding under Chapter IX is the "composition agreement," comprised of the plan and acceptances by creditors. Bankruptcy Act, §§ 82 and 83. That subject matter includes all securities "affected" by the plan; and the holders of such securities are necessary parties to the proceeding. But the subject matter does not encompass any security that is unaffected by the plan; and the holders of unaffected securities are neither necessary nor proper parties.

Petitioner's former corporation, and Roberts, were necessary parties in their respective capacities as holders of other securities affected by the plan, but were neither necessary nor proper parties in their several capacities as holders of unaffected bonds and appurtenant unaffected coupons. In those capacities, they were as much strangers to the proceeding as if neither had held affected securities. Consequently, their attempts to submit claims on unaffected bonds and appurtenant unaffected coupons did not confer jurisdiction of either the unaffected securities or the persons of their holders. And because Petitioner's motion pertained only to unaffected securities, he was never, and is not now, either a necessary or proper party, and his motion did not confer jurisdiction of either his unaffected securities or his person.

The Court of Appeals held that in being forced to litigate the question of "recovery" in the composition proceeding, instead of in a separate action of which the District Court would not have jurisdiction, Petitioner "is getting what he asked." (11209, p. 18). That statement is not strictly accurate. His motion was for the dissolution of any injunction restraining him from bringing an action on his securities, or in the alternative, that he be permitted to litigate their "validity" in the composition proceeding. (10607, pp. 36-37). He did not ask permission to litigate the question of "recovery" in the court of bankruptcy.

The alternative prayer undoubtedly was ill advised. However, the composition proceeding had progressed so far toward extinguishing Petitioner's rights that counsel was desperate as to remedy, and uncertain of the law, with the result that he besought the court of bankruptcy, in the alternative, to exercise a jurisdiction with which he now believes it has never been invested. The subsequent decisions, two by the District Court (10607, pp. 44-45; 11209, pp. 6-9) and two by the Court of Appeals,[14] have resolved neither the desperation nor uncertainty, but counsel does confidently submit that if the court of bankruptcy lacked jurisdiction of the securities, Petitioner did not have the power to confer it.[15]

Point V

By deciding that the District Court possesses "discretion," in a municipal composition proceeding, to adjudge whether or not Petitioner can recover on securities that were not affected by the fully executed plan of composition, and whether or not he should be released from an injunction perpetually restraining the commencement of actions on securities affected by the plan, the Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings in a court of bankruptcy, as to call for the exercise by this Court of its power of supervision.

Counsel believes and urges that the argument under Points I to IV, inclusive, *supra,* demonstrates that this proposition is sound. The meat of the argument is that to

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[14] *Wright* v. *Board,* 5 Cir., 142 F. 2d 577; *Wright* v. *Board,* 5 Cir., 148 F. 2d 367.

[15] *Vallely* v. *Northern F. & M. Ins. Co.,* 254 U. S. 348; also *Cutler* v. *Rae,* 7 How. 729; *The Lucy* v. *U. S.,* 8 Wall. 307; *People's Bank* v. *Winslow,* 102 U. S. 256; *Minnesota* v. *Northern Securities Co.,* 194 U. S. 48; *Fraenkl* v. *Cerecedo,* 216 U. S. 295; *Exporters of Mfrs.' Products* v. *Butterworth-Judson Co.,* 258 U. S. 365; *Stratton* v. *St. Louis S. W. R. Co.,* 282 U. S. 10.

require Petitioner to litigate his rights in a Court that cannot enforce, but can extinguish them, so far sanctions a departure from the accepted and usual course of judicial proceedings as to call imperatively for the exercise by this Court of its power of supervision.

Respectfully submitted,

MILLER WALTON,
Attorney for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 257

ED. C. WRIGHT,

Petitioner,

vs.

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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Subject Index

SUMMARY OF PREVIOUS LITIGATION

Concerning the identical bonds which are the subject matter of the present litigation, and concerning which the Petition for Certiorari is presented.

1st Appeal: From District Court to Circuit Court of Appeals.

N. A. Turner as Trustee, vs. Board of Public Instruction of Broward County, Florida, 75 Fed. (2nd) 147. (Record No. 7551) (Appeal Dismissed)

2nd Appeal: From District Court to Circuit Court of Appeals.

Roberts vs. Board of Public Instruction for the County of Broward, State of Florida, 112 Fed. (2nd) 459. (Record 9381) (District Court Affirmed)

3rd Appeal: From District Court to Circuit Court of Appeals.

Roberts vs. Board of Public Instruction for the County of Broward, State of Florida, 117 Fed. (2nd) 943. (Record 9596)

(District Court Affirmed—Re-hearing Denied)

Petition for Certiorari—From Circuit Court of Appeals to Supreme Court of the United States.

Albert Roberts, Jr., Petitioner, vs. Board of Public Instruction for the County of Broward, State of Florida, 313 U. S. 582, 61 Supreme Court Reporter 1101. (Record 972 in this Court) (Certiorari Denied)

4th Appeal: From District Court to Circuit Court of Appeals.

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5th Appeal: From District Court to Circuit Court of Appeals.

Ed. C. Wright vs. Board of Public Instruction for the County of Broward, State of Florida, 148 Fed. (2nd) 367. (Record No. 11209) (District Court Affirmed) (Petition for Re-hearing Denied)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 257

ED. C. WRIGHT,

Petitioner,

vs.

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA

Respondent.

SUMMARY STATEMENT

Ed. C. Wright, Petitioner, is the assignee and present holder of thirteen bonds and the coupons belonging thereto, which have been the subject matter of continuous litigation since October 3, 1932. His predecessor in title, N. A. Turner, as Trustee, sold the bonds after an adverse opinion on the first appeal. Albert Roberts, Jr., predecessor in title of coupons belonging to said bonds sold same to Ed. C. Wright after adverse opinions rendered in the 2nd. and 3rd. appeals. Ed. C. Wright, Petitioner herein, took the 4th. and 5th. appeals, and now brings this Petition for Certiorari.

The first holder, N. A. Turner, as Trustee, attempted

to recover a general judgment upon the bonds and coupons in the District Court of the United States for the Southern District of Florida, and such bonds and coupons were introduced in evidence and properly identified as Exhibits. The Jury found for the Defendant, (R. 7551 page 153), and a judgment was entered on April 10, 1934, that the Plaintiff "do not recover". (R. 7551 p. 153). Plaintiff took an appeal to the Circuit Court of Appeals, which was dismissed by said Court in the case of N. A. Turner, as Trustee, vs. Board of Public Instruction for Broward County, Florida, 75 Fed. (2nd) 147. Upon Petition of Counsel for Plaintiff, the original bonds and coupons which had been introduced and identified by Court markings were allowed to be withdrawn by Order of the District Court. (R. 9596 p. 309).

The bonds and coupons next turned up in the possession of Ed. C. Wright & Company, but all of the identification markings, showing that they had been introduced in evidence in litigation had been removed by ink eradicator, although careful examination revealed traces of the identifing Exhibit numbers. Ed. C. Wright & Company, was a corporation of Florida, with Ed. C. Wright as President and Albert Roberts, Jr., as Vice President. Before the institution of Municipal Bankruptcy proceedings the fact of previous litigation and the invalidity of the bonds and coupons were discussed with these officials. (R. 9596 pp. 150 and 156). Upon the filing of Municipal Bankruptcy proceedings by the Board of Public Instruction of Broward County, Florida, Albert Roberts, Jr., filed a claim upon the detached coupons claiming to own same, and Ed. C. Wright & Company filed a claim upon the bonds, claiming to own same. In the Municipal Bankruptcy proceedings both Ed. C. Wright and Albert Roberts, Jr., opposed the proceedings at every stage, attempting to force recognition of the bonds

and coupons. Upon the disallowance of the claims filed upon said bonds and coupons, (Record 9596 pp. 238, 239, 240), Albert Roberts, Jr., took the 2nd. and 3rd. appeals to the Circuit Court of Appeals, while Ed. C. Wright stood silent. The Circuit Court of Appeals in a very strong opinion pointed out the scheme and connivance of these two parties, and upheld the District Court's Interlocutory Decree disallowing the claims. See opinion in Roberts vs. Board of Public Instruction, 117 Fed. (2nd) 943, certiorari denied 313 U. S. 582, 61 Supreme Court Reporter 1101.

The Municipal Bankruptcy proceedings were concluded in due time and the securities were duly exchanged. Then Ed. C. Wright, who had remained silent while Albert Roberts, Jr., had been litigating, came forward as the assignee of Ed. C. Wright & Company and of Albert Roberts, Jr., claiming that he was an innocent purchaser for value without notice, that he was not advised of the previous litigation by his associate and Vice President of the corporation, and prayed that he be not bound by the decisions and rulings. From adverse rulings by the District Court, he took the 4th. and 5th. appeal, and now prosecutes this Petition for Certiorari.

Thus issues which should have been settled by jury verdict in April 1934, and certainly by the Interlocutory Decree in the Municipal Bankruptcy proceedings duly affirmed by the Circuit Court of Appeals, have been kept alive by various and sundry transfers and assignments and by continuous litigation over a period of eleven years. The present Petition of Certiorari is the second attempt to bring this case to this Court.

QUESTION PRESENTED

The particular question involved is the correctness of an Interlocutory Decree in Municipal Bankruptcy Proceedings brought under Chapter IX of the Bankruptcy Act, which Interlocutory Decree was entered March 6, 1940 (R. 9596 p. 403) and approved by the Circuit Court of Appeals, in Albert Roberts, Jr., vs. Board of Public Instruction, 117 Fed. (2nd) 459. Ed. C. Wright, the present litigant, hopes to recover upon the bonds and coupons disallowed in the Interlocutory Decree by the entry of a general judgment in the law courts. He hopes to avoid the disallowance of the claim in the bankruptcy proceedings and subsequent approval by the Circuit Court of Appeals, as well as the appropriate defenses of laches, estoppel, res adjudicata, stare decisis, as well as actual bad faith, upon the grounds that he was misled as to the effect of the rulings in the bankruptcy proceedings, that he was without the benefit of advice of counsel, that he was taken by surprise, and that he was a bona fide purchaser for value without notice. If these allegations constitute a sufficient defense, which, if duly proven, would have the effect of avoiding the findings in the Interlocutory Decree, they must be substantiated by evidence. The Circuit Court of Appeals Ordered the District Court to take testimony upon these issues, and in compliance with the opinion of the Circuit Court of Appeals, the District Court entered an Order providing for the taking of testimony, from which order another appeal was taken. The actions of the litigant Ed. C. Wright clearly demonstrate that he does not wish to have testimony taken as to the truth or falsity of his claims, but prefers to keep the matter in the Appellate Courts. On the 5th. Appeal, the Circuit Court of Appeals approved the procedural order of the District Court, and Petitioner now brings Petition for Certiorari to this Court.

REASONS WHY THE WRIT SHOULD NOT BE ALLOWED

The only step taken between the 4th. and 5th. appeals, was the entry of the Opinion-Order regulating future proceedings, and providing for the taking of testimony in accordance with the opinion of the Circuit Court of Appeals in the 4th. appeal. The Circuit Court of Appeals' opinion upon the 4th. appeal was not complained of by Petitioner, but the entry of a procedural order based upon same, gave the Petitioner an opportunity to resort to the appellate courts again, and thus by protracted litigation attempt to force some kind of settlement. The Courts should not be used for such purposes.

STATEMENT OF JURISDICTION

It does not appear that the jurisdiction of this Court is properly invoked, for no showing is made that the entry of the procedural order involves a case of particular gravity or general importance sufficient to cause said matter to be brought here by certiorari under the provisions of Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347 (a)). The Opinion-Order appealed from (R. 11209 p. 6) was not a final order but merely a procedural one, arranging time for further proceedings consistent with the decision of the Circuit Court of Appeals. Yet another appeal lies when the testimony has been taken and a decision rendered thereon. The questions to be determined cannot be determined without evidence, and petitioner is reluctant to present evidence to support his contentions.

ARGUMENT AGAINST ALLOWANCE OF WRIT

Five points are argued by Petitioners in support of the Petition for Certiorari, but Respondent fails to see that any of the points are involved in the entry of the procedural order (R. 11209 p. 6) and the opinion of the Circuit Court of Appeals approving same. See Ed. C. Wright vs. Board of Public Instruction for the County of Broward, State of Florida, 148 Fed. (2nd) 367. We respectfully direct the attention of this Honorable Court to such Opinion-Order of the District Court and the Opinion of the Circuit Court of Appeals, and leave the matter to the discretion of this Court. No useful purpose could be served by bringing this case here for review at this time.

Respectfully submitted,

JULIAN E. ROSS,

JOHN D. KENNEDY,

By.....

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